Supreme Court, U.S.
FILED
JUL 19 2002
CLERK

(10)

No. 01-1231

IN THE

SUPREME COURT OF THE UNITED STATES

CONNECTICUT DEPT. OF PUBLIC SAFETY, *ET AL.*,

Petitioners,

v.

JOHN DOE, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE, CENTER FOR THE COMMUNITY INTEREST, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits a State from listing convicted sex offenders in a publicly accessible registry without first giving the convicted sex offenders individualized hearings on whether they are "currently dangerous" or attempting to sort the offenders into "tiers" based on predicted likelihood of recidivating.

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INTEREST OF AMICUS CURIAE[1]

The Center for Community Interest ("CCI"), formerly known as the American Alliance for Rights and Responsibilities, is a national nonprofit organization headquartered in New York City.[2] CCI's goal is to make our communities safe places to live and raise children and to make the public areas of our cities secure and inviting places for all people by helping to identify commonsense, balanced solutions to crime and quality-of-life problems. CCI also helps to defend those policies against legal attacks. CCI has successfully helped localities and civic groups across the country remove drug dealers from housing projects, pornography shops from neighborhoods, gangs from street corners, and guns from schools. CCI has also assisted in defending the legality and propriety of "Megan's Laws."

CCI has filed briefs in the United States Supreme Court and numerous federal and state courts defending commonsense positions on the above issues, and on other matters such as aggressive panhandling, gangs, drunk driving, and prostitution. CCI has also defended drug-related evictions, security searches in public housing, and tailored drug-testing

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[1] Letters of consent to the filing of this brief are being contemporaneously lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for the amicus state that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] CCI's Board of Directors and Board of Advisors include: William Bratton, former New York City police commissioner; Fr. George Clements, Mac Arthur Prize recipient and founder of *One Church-One Child*; Mary Ann Glendon, Harvard Law School professor; George Kelling, Rutgers University professor and co-author of *Fixing Broken Windows*; Henry Luce III, chairman of the Henry Luce Foundation; Richard Lyman, past president of Stanford University; and Ronald Truss, president of the Birmingham, Alabama chapter of the NAACP.

programs in public schools. CCI has been at the forefront of efforts to reform child abuse laws to emphasize the lives and safety of children rather than the "rights" of adults in cases of starvation, torture, sexual abuse, or other depraved conduct.

Laws providing access to sex offender information, such as Connecticut's version of Megan's Law, are important empowerment tools to help members of communities make their own informed decisions about how they want to protect themselves and their children against convicted sex offenders living and working in their midst. The decision of Connecticut and numerous other States to provide community access to such information — without claiming to have sorted those convicts into categories based on likelihood of reoffending, and with a forthright acknowledgment that no such predictions of future dangerousness have occurred — is sensible and straightforward. Studies have shown high rates of recidivism among sex offenders, and there is no dispute that victims of sexual offenses, both children and adults, suffer tremendous trauma from such crimes. Requiring multi-tiered sorting systems, as the judgment below would do, exposes victims of sex offenses to potentially having to testify about the traumatic harms they suffered in order to attempt what experts acknowledge is an elusive prediction of future dangerousness. Such a process would force victims to revisit and harmfully relive those traumatic events. While States are certainly free to opt for multi-tiered sex offender regimes — notwithstanding the substantial human and financial costs that they may entail — CCI believes that States also can constitutionally decide to provide community access to a single set of truthful sex offender information with the accompanying acknowledgment that no tiering based on likelihood of reoffending has been attempted.

STATEMENT OF THE CASE

Like all other States, Connecticut has enacted a version of "Megan's Law" under which persons convicted of certain criminal sex offenses are required to register with the State's Commissioner of Public Safety ("Commissioner" or "DPS") promptly upon release into the community. *See* Conn. Gen. Stat. §§ 54-250 to 54-261 (2001).[3] As acknowledged by both the Court of Appeals for the Second Circuit and the district court, Connecticut's sex offender registration law was enacted "in response to concerns 'regarding the harm to society caused by sex crimes and the relatively high rate of recidivism among sex offenders.'" *Doe v. Lee*, 132 F. Supp. 2d 57, 66–67 (D. Conn. 2001) (quoting *Roe v. Office of Adult Probation*, 125 F.3d 47, 48 (2d Cir. 1997), and citing *Connecticut v. Misiorski*, 738 A.2d 595, 601-02 (Conn. 1999)); *accord Doe v. Lee*, 271 F.3d 38, 41–42 & n.4 (2d Cir. 2001).

A. The Connecticut Sex Offender Registry System

Under Connecticut's sex offender registry system ("SORS"), all registrants must provide the following information to the DPS after their release: name, address, criminal history, fingerprints, a blood sample for DNA analysis, a photograph, and a description of particular identifying physical characteristics. If a registrant moves, he must inform the State of his new address within five days; if a registrant resides temporarily in another state, he must register with the responsible agency in that state and must comply with

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[3] These laws are called "Megan's Laws" because the first such law was passed by the State of New Jersey in response to outrage over the death of Megan Kanka, a 7-year old who was abducted, raped, and murdered in 1994 by a man who lived across the street from Megan's family. Prior to the murder no one — neither Megan, her family, members of the community, nor local police — was aware that the murderer had twice previously been convicted of sex offenses with young girls, nor was anyone aware that he was living with two other men who had also been convicted of sex offenses. *See, e.g., E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997).

whatever additional duties are imposed on sex offenders there. *See* Conn. Gen. Stat. §§ 54-250(3), 54-251(a), 54-252(a), 54-254(a). All registrants must comply with SORS's periodic address verification requirements, *see id.* § 54-257(c), and registrants must be photographed at least once every five years. *See id.* §§ 54-251(a), 54-252(a), 54-254(a), 54-257(d). Failure to comply with any of these requirements is a Class D felony. *See id.* §§ 54-251(e), 54-252(d), 54-253(c), 54-254(b). Connecticut's SORS applies to persons convicted of four categories of offenses, and the specific registration requirements differ, depending upon the type of crime for which the offender was convicted and the offender's criminal history. *See id.* §§ 54-250(2), (5), (11), (12), 54-251(a), 54-252(a), 54-254(a). The Commissioner may not elect to remove any individual offender from the Registry or exempt an offender from registration requirements.[4] *See Doe*, 132 F. Supp. 2d at 61.

Connecticut's SORS directs the Commissioner to compile this information in a central registry ("Registry") and to share the information with local, state, and federal law enforcement officials. *See id.* § 54-257(a). The Commissioner and local and state law enforcement officials are also to make the Registry information available to the public during normal business hours. *See id.* § 54-258(a)(1). The DPS is further directed to post this information on an Internet website and to

[4] Two classes of offenders are eligible for exemption from registration, upon a finding by a Connecticut court that "registration is not required for public safety": (a) anyone who was convicted of engaging, while 18 or younger, in sexual intercourse with a victim who was (1) more than two years younger than him or her and (2) between the ages of 13 and 15 at the time of the offense; and (b) anyone who was convicted of subjecting another person to sexual contact without consent. Conn. Gen. Stat. § 54-251(b) & (c). In addition, the Registry information of certain offenders may be restricted by court order to law enforcement personnel only. These offenders include persons convicted of, *inter alia*, sexual assault in a spousal or cohabiting relationship or any crime involving a victim under the age of 18 to whom the offender is related, if the court finds that publication is not required for public safety and would reveal the victim's identity. *Id.* § 54-255(a) & (b).

issue notice quarterly to media outlets in Connecticut about the availability and means of accessing the Registry. *See id.*

The district court correctly characterized Connecticut's SORS as an undifferentiated or single-tier classification system under which all sex offenders convicted or found not guilty by reason of insanity are included in the Registry. *Doe*, 132 F. Supp. 2d at 59–60 & n.3. The district court found on undisputed evidence that while the DPS has a procedure in place "to respond to challenges to the accuracy or completeness of" information contained in the Registry, "none of the agencies involved in the registration process . . . conducts any individualized assessment of the public safety threat posed by an individual when deciding whether he must register." *Id.* at 61.

Connecticut's "Sex Offender Registry" website became available on January 1, 1999, and during the first five months of operation, it was visited over three million times. *See Doe*, 271 F.3d at 44 n.14. Prior to the district court's ruling in this case, a visitor to the website could search by last name, by first letter of a last name, or by town or zip code, and could thereby access a web page containing the registrant's name, offense, current residence, physical description, and photograph. *See Doe*, 132 F. Supp. 2d at 61. Sometime between December 1998 and May 1999, Connecticut added the following express disclaimer to the website:

> The [DPS] has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any

> specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in the registry . . . is subject to criminal prosecution.

Doe, 271 F.3d at 44-45. The Registry website also stated, "[t]his information is made available for the purpose of protecting the public." *Id.* at 45.

Connecticut's SORS was enacted to comply with federal regulations (64 Fed. Reg. 572 (1999)) issued to implement the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (the "Wetterling Act"), 42 U.S.C. § 14071 (1994 & Supp. V 1999). Under the Wetterling Act – which sets minimum or threshold standards for sex offender registration and notification regimes – States must "release relevant information . . . necessary to protect the public concerning a specific person required to register" under the Act. 42 U.S.C. § 14071(e)(2). Any State that fails to comply with the Act loses ten percent of federal grant monies it otherwise would receive. 42 U.S.C. § 14071(g)(2)(A).

The regulations expressly declare that States may "make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." 64 Fed. Reg. at 582. The regulations also allow States to have information-on-request notification systems, by which members of the public may view sex offender information. *See id.* In this regard, the regulations declare that States that have "information-on-request systems may make judgments about which registered offenders or classes of registered offenders should be covered and what information will be disclosed concerning these offenders." *Id.*

Connecticut's SORS, whose registration and community information access rules are based solely on the nature of

the crime(s) for which an offender has been convicted, is consistent with access systems maintained by numerous States and the District of Columbia. *See generally* Logan, *A Study in Actuarial Justice: Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 603 (2000) (stating that nineteen States have adopted systems without individualized risk assessments). Significantly, Connecticut's chosen regime is also consistent with the Campus Sex Crimes Prevention Act of 2000, which requires States to ensure community access to information about all registered sexual offenders enrolled in or employed by an institution of higher education, without regard to individualized risk determinations. *See* Publ. L. No. 106-386, § 1601, 114 Stat. 1537 (to be codified at 20 U.S.C. § 1092(f)(1) and 42 U.S.C. § 14071(j) (effective October 2002)).

B. The Constitutional Challenge Advanced Below

On February 22, 1999, Respondents John Doe and Sam Poe filed suit under 42 U.S.C. § 1983, alleging on behalf of themselves and others similarly situated that Connecticut's SORS violated their Fourteenth Amendment right to Due Process by denying them a constitutionally protected liberty interest without notice or meaningful opportunity to be heard. *See Doe*, 132 F. Supp. 2d at 62. Doe, a Connecticut SORS registrant who provided undisputedly accurate Registry information to the Commissioner, claimed as a factual matter that he was not "a dangerous sexual offender" and did not "pose a threat to the safety of the community." *Id.* Nonetheless, he contended, he had been stigmatized for purposes of Due Process protection because the State failed to provide him with an opportunity to challenge the "implied allegation" that he is a "dangerous sex offender." *Id.* Doe claimed that this allegation arises from the "undifferentiated nature" of the Registry itself, in which "dangerous and nondangerous registrants are grouped in a single classification" – that is, "sex offender" – and because the Registry provides no information with respect to any individual registrant's "dangerousness." *Id.* Doe also alleged that Connecticut's

SORS altered his legal status under the law, because the registration requirements imposed an extensive burden on his personal liberties, separate from the "'deleterious effects which flow directly from a sullied reputation.'" *Id.* at 65 (citation omitted).

C. The District Court's Ruling

The district court (Chatigny, J.) agreed with Respondents' contentions and granted summary judgment on the Due Process claim, "essentially because the undifferentiated nature of the registry stigmatizes nondangerous registrants by grouping them together with dangerous registrants." *Doe*, 132 F. Supp. 2d at 59.[5] The district court found that the State had not provided Respondents with a chance to challenge the stigma, "implied by" their inclusion in Connecticut's single-tiered Registry, that they were dangerous sex offenders. *Id.* at 62. The district court reasoned that "[t]he implied allegation . . . arises from the undifferentiated nature of the registry, in which dangerous and nondangerous registrants are grouped in a single classification and no information is provided regarding any registrant's dangerousness." *Id.*

Utilizing the "stigma plus" analysis derived from cases such as *Paul v. Davis*, 424 U.S. 693 (1976), the district judge concluded that the Respondents had indeed suffered "stigma, that is, . . . public opprobrium and damage to . . . reputation." *Id.* at 63 (internal quotation marks and citation omitted). The court reasoned:

> Despite the accuracy of the registry data concerning the plaintiff and the statement on the web site that no determination of any individual's dangerousness has been made, the registry suggests that plaintiff is currently dangerous. Specifically, the undifferentiated nature of the registry and the undisputed purposes of [Connecticut's SORS] make it reasonable for a viewer of the registry to conclude that any particular registrant is dangerous.
>
> * * * *
>
> While it is true . . . that the viewer has no reason to think the registrant is one of those who is dangerous, the viewer also has no reason to think the registrant is not dangerous. Because there is no classification system, the viewer has neither absolute nor relative information regarding the dangerousness of the registrant.

Id. at 63-64 (footnotes and internal citations omitted). As a result, the district court stated, "[b]y omitting to provide such relative information, Connecticut's system has the effect of falsely suggesting that nondangerous registrants are in fact dangerous." *Id.* at 64.

The district judge further concluded that SORS's requirements were sufficient to establish a material alteration of Respondents' legal status, beyond mere damage to their reputations, thereby satisfying the "plus" factors necessary to establish a Due Process violation in this context. *See Doe*, 132 F. Supp. 2d at 64–65 (citing cases, including *Paul v. Davis*, 424 U.S. 693 (1976)). Based on its finding that Connecticut did not provide any individualized means of determining a registrant's dangerousness before inclusion in the Registry, the district court held that non-dangerous sex offenders, such as Respondents claim to be, must be afforded an opportunity to be heard about their alleged non-dangerousness before the State deprives them of their liberty interest. *See id.* at 66.

In May 2001, the district judge entered a permanent injunction prohibiting Petitioners from "disclosing or dissemi-

[5] Plaintiffs also brought an *ex post facto* claim on the same facts, against which the district court ruled at summary judgment. That aspect of the district court's decision is not before this Court.

nating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class if the information identifies the class member as being included in the Registry," and from "identifying any member of the due process class as being included in the Registry." *Doe v. Lee*, No. 3:99 CV 314 (RNC), 2001 WL 536729, at *1 (D. Conn. May 17, 2001). The injunction does not prevent law enforcement agencies or officers from obtaining access to the Registry or using the information contained in it for law enforcement purposes. *Id.*

D. The Second Circuit's Affirmance

The Court of Appeals for the Second Circuit affirmed on the merits. *Doe v. Lee*, 271 F.3d 38 (2d Cir. 2001). Although it rejected certain aspects of the district court's Due Process analysis, the Second Circuit nonetheless concluded that Connecticut's single-tiered Registry necessarily and falsely implied that "persons listed . . . are particularly likely to be currently dangerous." *Id.* at 50.

The Second Circuit reasoned that an offender's inclusion in the Registry as a person "convicted of crimes characterized by the State as sexual offenses" "plainly" stigmatized the registrant, even though the statement was true as a matter of fact. *Id.* at 47. What makes the stigmatizing statement false, and therefore actionable in the court's view, is the inference that a registrant, by inclusion in Connecticut's single-tiered SORS, is a "'*presently dangerous* sex offender.'" *Id.* at 48 (emphasis in opinion) (quoting Respondents' brief).

The Second Circuit rejected the district court's conclusion that Connecticut's SORS "implies that every person listed therein is in fact dangerous." *Id.* at 48 (citing *Doe*, 132 F. Supp. 2d at 63). Because the Registry includes *all* sex offenders who have been convicted of covered crimes, the Second Circuit was unable to conclude that a viewer would understand the Registry "to say or imply that *all* of the registrants are in fact currently dangerous." *Id.* at 49 (emphasis in original).

Nonetheless, the Second Circuit found that the Registry was defamatory as to Plaintiff-Respondents because it implies that some registrants are dangerous and that each individual registrant is more likely than the average person to be currently dangerous. *See id.* at 48. In concluding that Connecticut's undifferentiated, single-tiered SORS violated Doe's Due Process rights, the Second Circuit reasoned:

> [D]isclosing the identity of persons who are currently a threat to public safety is the sole avowed and legitimate purpose of the registry. Even the disclaimer itself, by asserting that the DPS "has made no determination that any individual included in the Registry is currently dangerous," clearly implies that some may be. But the list is undifferentiated; it does not say which registrants are or may be currently dangerous and which are not.
>
> We think that it follows that publication of the registry implies that each person listed is more likely than the average person to be currently dangerous. That implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offences, and information as to their current whereabouts. This implication stigmatizes every person listed on the registry.

Id. at 49.

The Second Circuit also concluded that the registration requirements imposed by Connecticut's SORS qualified as "plus factors" under the "stigma plus" test of *Paul v. Davis*, 424 U.S. 693 (1976). *See Doe*, 271 F.3d at 56-57. The Second Circuit held that Respondents were "entitled to the opportunity to have a hearing consistent with due process principles to determine whether or not they are particularly likely to be

currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." *Id.* at 62.

The judgment of the Second Circuit was entered on October 19, 2001. Defendant-Petitioners timely filed a Petition for a Writ of Certiorari, which was granted on May 20, 2002.

SUMMARY OF ARGUMENT

Legislatures attempting to provide people with information about convicted sex offenders in their communities are confronted with substantial evidence of the following four propositions: (1) sex offenders recidivate at serious and elevated rates; (2) sex offenders inflict horrible damage on their victims, many of whom are children; (3) it can be difficult to confidently predict whether any given convicted sex offender will recidivate and, if so, when; and (4) there are substantial potential human and financial costs associated with trying to make individualized predictions, including the potential for victims of sex offenses to have to testify about those crimes. Given the evidence of those propositions, a State can rationally conclude that multi-tiered sex offender registries are flawed and that the better approach is to provide community access to a single set of accurate sex offender information with an accompanying acknowledgment that no tiering based on likelihood of reoffending has been attempted.

This type of single-tier sex offender information system conveys no false assertions, either express or implied, about registrants. Nothing in this Court's precedents supports the conclusion that an impliedly false assertion is created by the publication of concededly truthful information about individuals' criminal convictions, particularly where publication is accompanied by an express disclaimer making clear that no individualized assessment of dangerousness was done. The fallacy in the Second Circuit's conclusion to the contrary is made particularly clear by the fact that virtually all of the information in the Connecticut SORS is public information that constitutionally cannot be removed from the public

domain. At bottom, the lower courts' decisions reflect an unwarranted mistrust in the ability of ordinary Americans to rationally evaluate truthful information about sex offenders in their communities and make intelligent decisions based on it.

A State need not enact a multi-tiered sex offender notification system to comport with the Constitution. Rather, a State may adopt a single-tier information access system that allows community members to make decisions *for themselves* about what steps, if any, are appropriate in a given situation to protect themselves and their families.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS A LEGISLATIVE DECISION TO ENACT A SINGLE-TIER INFORMATION ACCESS SYSTEM

Appreciating the backdrop against which Connecticut legislates is useful in assessing the permissibility of single-tier sex offender information access mechanisms such as the one chosen by the State of Connecticut. This backdrop similarly exists for Congress, the District of Columbia, and the many other States that have adopted single-tier sex offender information access mechanisms in which all persons convicted of defined sexual crimes are included. As explained further below, there is substantial evidence from which a legislature can reasonably conclude that: (1) sex offenders recidivate at serious and elevated rates; (2) sex offenders seriously harm their victims, who often include children; (3) it is difficult to assess the likelihood of any particular sex offender recidivating; and (4) there are substantial potential human and financial costs presented by a multi-tiered sex offender system. Based on available information, a State can make the eminently sensible decision to adopt a single-tier sex offender information access system to help inform members of the public about convicted sex offenders living and working in their midst.

A. Sex Offenders Recidivate at Serious and Elevated Rates

Numerous courts have acknowledged the evidence of the high rate of recidivism for sex offenders. For example, in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), the New Jersey Supreme Court, in upholding New Jersey's version of Megan's Law, reviewed extensive evidence of elevated recidivism rates for sex offenders. That evidence indicated that "'[a]s a group, sex offenders are significantly more likely than other repeat offenders to reoffend with sex crimes or other violent crimes, and that tendency persists over time.'" *Id.* at 375 (quoting brief of State of New Jersey).

Poritz noted various studies conducted by State and federal authorities, including a fifteen-year follow-up study of sex offenders in California in which 19.7% of sex offenders were rearrested for a subsequent sexual offense and in which "'[s]ex offenders were five times as likely as other violent offenders, and more than six times as likely as all types of offenders, to reoffend with a sex offense.'" *Id.* The evidence also included a review of "'the most frequently cited studies of sex offender recidivism,'" which indicated that rapists repeat their offenses at rates up to 35% and child molesters repeat their offenses at rates up to 29-40%. *Id.* The *Poritz* Court aptly stated that there was "no dispute," as far as the people of New Jersey were concerned, that "the relative recidivism rate of sex offenders is high compared to other offenders." *Id.* at 374 n.1. *Accord, e.g., Cutshall v. Sundquist*, 193 F.3d 466, 476 (6th Cir. 1999) (rejecting various constitutional attacks to Tennessee's "Megan's Law" and recognizing studies indicating that "sexual offenders have high rates of recidivism"); *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997) (quoting findings of the New York legislature concerning "the danger of recidivism posed by sex offenders"); *Lanni v. Engler*, 994 F. Supp. 849, 853 (E.D. Mich. 1998) (rejecting various constitutional attacks, including a Due Process attack, to Michigan's "Megan's Law," and noting that sex offenders "by

virtue of relatively high recidivism rates" "pose a serious threat to society").

There is also a substantial body of scholarly literature discussing the serious rate of recidivism for sex offenders. For example, a 1995 article reviewing twelve studies of sexual offenders concluded that the average recidivism rate was 27% for those who did not receive treatment and 19% for those who did receive treatment. *See* Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. Consulting & Clinical Psychol. 802, 806 (1995) (collecting studies). Another study conducted in Massachusetts in 1997 found that 26% of rapists committed new sexual offenses within twenty-five years (with an average of 4.55 years before reoffense), and that 32% of child molesters recidivated (with an average of 3.64 years before reoffense). *See* Prentsky, *et al.*, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 642-43 (1997). A 1991 review of recidivism studies likewise found recidivism rates of 20-40% for exhibitionists and up to 35.6% for rapists. *See* McGrath, *Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 35 Int'l J. Offender Therapy & Comp. Criminology 328, 334 (1991) (citing studies).

To be sure, and as courts have acknowledged, the scholarly literature concerning sex offender recidivism is not uniform and presents some conflicting opinions, "especially concerning the precise numbers" regarding recidivism rates. *Poritz*, 662 A.2d at 374 n.1; *accord* United States Sentencing Commission, *Report to the Congress: Sex Offenses Against Children* 32 (June 1996) (noting variation). But such variation in data does not limit legislatures; indeed, "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting statutes." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997).

In choosing to enact Connecticut's single-tier sex

offender information access regime, it is clear that the legislative representatives of the people of Connecticut were acting "in response to concerns regarding . . . the relatively high rate of recidivism among sex offenders." *Doe v. Lee*, 132 F. Supp. 2d 57, 66-67 (D. Conn. 2001) (internal quotation marks and citations omitted); *accord, e.g., Roe v. Adult Probation*, 125 F.3d 47, 48 (2d Cir. 1997) (stating that Connecticut enacted its version of Megan's Law in response to concerns about "the relatively high rate of recidivism among sex offenders"). There is ample authority upon which Connecticut could determine that the serious rate of recidivism presented by convicted sex offenders requires that people have access to information about these offenders in their communities. Access to information is necessary so that individuals can decide for themselves what precautions, if any, are appropriate to protect themselves, their spouses, and their children against undue risk of criminal sexual misconduct.

B. Sex Offenders Seriously Harm Their Victims, Who Often Include Children

It goes almost without saying that sex offenders inflict horrific damage upon their direct victims — most of whom are women and children -- and against society as a whole. The original Megan's Law was enacted to try to prevent such damage, *see Poritz*, 662 A.2d at 374 n.1, as was the Connecticut sex offender notification regime at issue in this case, *see Roe*, 125 F.3d at 48. Studies have estimated that "[b]etween 1 in 10 and 1 in 4 adult women are raped or sexually assaulted during adulthood and prevalence figures are similar for child victims of sexual aggression." Hall, 63 J. Consulting & Clinical Psychol. at 802 (citations omitted); *see also* Hanson and Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. Consulting & Clinical Psychol. 348, 348 (1998) (citing studies estimating that 10% of boys and 20% of girls suffer from sexual assault). Victims of sexual molestation and assault suffer physical, psychological, and emotional damage that can be debilitating and that can remain with

them the remainder of their lives.

C. A Legislature Can Reasonably Conclude That It is Difficult to Assess the Likelihood of a Sex Offender Recidivating

There is a considerable body of evidence and opinion attesting to the difficulty of accurately predicting whether any particular sex offender will commit another sex offense in the future. For example, the Connecticut Supreme Court has recognized that "predictions of future dangerousness are tentative at best and are frequently conceded, even within the profession, to be unreliable." *Connecticut v. Putnoki*, 510 A.2d 1329, 1335 (Conn. 1986). Numerous studies have led one commentator to conclude that "[p]redicting risk to commit violence in general and sexual aggression in particular is an extremely difficult task." McGrath, 35 Int'l J. Offender Therapy & Comp. Criminology at 331 (collecting studies).

Part of the reason for the difficulty in accurately assessing the future dangerousness of a particular offender is that factors which affect dangerousness can vary over time and can meaningfully impact the degree of dangerousness an offender presents. For example, studies have found that repeat sex offenses correlate with variables such as whether the offender was consuming alcohol. *See id.* at 338 (citing research finding that 45% of rapists reported a connection between alcohol use and increased urges to rape, and that 30% of child molesters reported that alcohol increased their sexual attraction to children). Research also has found that an offender is more likely to recidivate if he is currently unemployed or has been drifting between jobs as opposed to being in a stable employment situation. *Id.* at 340. Studies also indicate that an offender who does not presently have a stable family or other support network may be at higher risk to commit another sex offense. *Id.*; *see also* American Psychiatric Ass'n, *Clinical Aspects of the Violent Individual* at 25 (1974) ("[D]angerousness is an attribute not only of persons but of

situations and environmental factors"). In addition, while offenders who truly accept responsibility for their offenses and want to change their behavior should present lower risk profiles, "[m]otivation to change is difficult to assess, . . . because there are clear benefits to 'appearing' willing to change, and many sexual offenders have the social skills necessary to gain the confidence of sympathetic clinicians." Hanson and Bussière, 66 J. Consulting & Clinical Psychol. at 349.

As a result of the difficulties in trying to measure the danger of recidivism presented by any particular offender at any particular time, a legislature can reasonably conclude that making predictions about relative dangerousness levels, within the universe of convicted sex offenders being released into the community, is a risky and elusive endeavor. A legislature similarly can conclude that requiring a multi-tiered sorting of sex offenders based on predictions of likely recidivism may have the unintended effect of presenting the public with a more limited, and less accurate, set of information than a uniform access system that contains accurate sex offender information with an accompanying acknowledgment that no tiering based on likelihood of reoffending has been attempted.

D. <u>There Are Substantial Potential Human and Financial Costs Attendant to a Multi-Tiered Sex Offender System</u>

There also are substantial potential human and financial costs associated with having a multi-tiered sex offender system. Tragically, some of these costs may be imposed on *prior victims* of sex offenses, who frequently are the only witnesses who can provide direct evidence concerning factors that will be used in attempting the elusive "sorting" process discussed immediately above.

Through the "sorting" process, victims of prior sex offenses (including violent rape and child molestation) will be exposed to the possibility of testifying because virtually any

multi-tiered system will look to the circumstances and facts concerning past sex offenses to try to predict future dangerousness. Of course, "[m]any of these facts will not have been determined by the trier of fact in the criminal proceeding," *E.B. v. Verniero* 119 F.3d 1077, 1108 (3d Cir. 1997), because a jury verdict, and even a plea colloquy, likely addressed only the elements of the crime of conviction. As a result, a prior conviction may be of limited utility, particularly where the sex offender was allowed to plead to a less serious charge so as to spare his victim from having to testify at trial. In this situation, the plea colloquy will likely have focused on the elements of the *less serious* charge. In fact, defense counsel may have insisted that the plea colloquy focus entirely on the elements of the lesser charge (as opposed to the more gruesome aspects of the bargained-away crime) as part of the deal that spared the victim from having to testify. *See generally In re C.A.*, 679 A.2d 1153, 1165 (N.J. 1996) (suggesting that "in the future" prosecutors should try to "ensure that the factual basis of the [other] sexual offenses that are dropped pursuant to the plea bargain are established by reliable evidence").

Likewise, a multi-tiered system almost certainly will look to whether the convicted sex offender has engaged in other sexual misconduct which was not the subject of criminal conviction. As a result, in attempting to undertake a multi-tiered sorting process, "the court will be called upon in some proceedings to determine the circumstances of sex offenses that have never been the subject of a criminal proceeding" at all. *Verniero*, 119 F.3d at 1108.

Simply put, in multi-tiered registration systems, there are many factors that go into the "sorting" process that may potentially involve factual issues about which the victim of the crime is the best source of evidence. As to the crime of conviction, these issues include: (1) the degree of force used by the offender; (2) the duration of offensive behavior; (3) the degree of contact between the offender and the victim; and (4) whether the offense involved the use of, *inter alia*, a weapon.

See id. at 1083-84 (reviewing various factors employed in New Jersey's multi-tiered system); *accord Doe v. Pataki*, 120 F.3d 1263, 1268 n.6 (2d Cir. 1997) (identifying similar factors used in New York's multi-tiered system). To the extent the multi-tiered sorting addresses whether the convicted sex offender has committed other offenses beyond the crime of conviction, the number of factors about which the victim (or *victims*) will be the best source of evidence simply multiplies.

With a multi-tiered system, victims of crimes sometimes will be required to testify because "[s]ex offenses are almost always committed in private. This means that potential witnesses with relevant knowledge of whether, and if so how, an alleged sex offense occurred are generally limited to the victim and the alleged offender." *Verniero*, 119 F.3d at 1108. To be sure, States with multi-tiered registration systems have tried to take steps to minimize the number of times that victims will actually be required to testify at sex offender hearings by allowing for the possible use of certain hearsay — for example, permitting consideration of out-of-court "statements [that were previously] subject to cross-examination, or other statements where circumstantial guarantees of trustworthiness exist." *In re C.A.*, 679 A.2d at 1165 (internal quotation marks and citations omitted).

Nonetheless, a State like Connecticut can reasonably conclude that the possibility of easing burdens on victim-witnesses through the potential use of certain hearsay is insufficient to warrant a multi-tiered sex offender system. In New Jersey, for example, a multi-tiered state, hearsay evidence is admitted only under certain circumstances. Although it can be used to establish a *prima facie* case for the prosecution in favor of an offender's classification in a higher tier, the sex offender may challenge the hearsay with his own reliable hearsay, or with an offer of live testimony, and that can be sufficient to raise a factual issue that needs to be resolved by a hearing. *See id.* at 1164-65. In such an instance, the prosecution is not *required* to advance victim-testimony in rebuttal,

and instead may choose to take its chances with its other evidence. *See id. at* 1166. The prosecution obviously does so at its peril given the factual dispute in play.

Moreover, the *potential* of needing to present victim testimony itself will inflict trauma on the victim because of the need to prepare the victim-witness. Specifically, the State's decision about whether to impose on a victim to testify may well be presented only after the court concludes that the "State's hearsay evidence . . . [was] sufficient to overcome live testimony [just] offered on behalf of the offender." *Id.* Thus, the State in a multi-tiered system may well have been required to inflict upon a victim the trauma of preparing to testify and thereby re-living the crime. This trauma will be imposed, regardless of whether the victim ultimately needs to testify in court, just to try to support classification of the convicted sex offender in a "tier" that will allow notification to the community of the offender's presence.[6] A State like Connecticut can naturally be skeptical of the wisdom of such a "sorting" endeavor.

Over and above these potential human costs — which in and of themselves could reasonably lead a State to conclude that a multi-tiered sorting process presents human costs that cannot be justified — there are also potentially significant financial expenditures associated with the multi-tiered sorting

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[6] New Jersey courts have certainly expressed reluctance to "compel a victim to testify unless it is absolutely necessary," and have even at times stated that such victim testimony will be compelled in "the rarest of cases." *In re C.A.*, 679 A.2d at 1166. Nonetheless, the decision about whether a victim will be compelled to testify is subject to the discretion of the trial court, *id.* at 1164-65, and victims may feel morally obliged, even if not compelled by pain of law, to testify (and thereby re-live their harms), so that others can be informed of and thereby protected from the sex offenders who harmed them. This moral pressure likely will be felt by a victim in direct proportion to the degree of trauma inflicted by the convicted sex offender. The multi-tiered sorting process creates these pressures on a victim to testify, even if he or she is not compelled by law to do so.

process. For example, Massachusetts estimated in 1999 that the annual operating budget for its sex offender registry board, which sorts sex offenders into tiers, would be $10 million. *See* Logan, 3 Buff. Crim. L. Rev. at 636 n.206. There are substantial financial costs associated with the "sorting" process for any offender and, of course, a sex offender can demand new hearings (sometimes as frequently as once a year) by asserting that he is "all better now" and no longer presents a threat. *See, e.g.*, N.Y. Correct. Law § 168-o (McKinney 2002) (providing for annual hearings if so requested by registrant).[7]

In the present environment of dramatically shrinking state budgets, a State like Connecticut can reasonably conclude that limited public funds can be spent on more appropriate things – such as education, healthcare for the poor, or combating domestic terrorism – than the funding of a multi-tiered sorting process for convicted sex offenders. So can Congress, in its treatment of information access in the Campus Sex Crimes Prevention Act of 2000, and the District of Columbia and many other States that have similarly opted against multi-tier sex offender registration regimes in favor of regimes where all those who have been convicted are included. The reasonableness of such a decision is particularly apparent given the evidence that the multi-tiered sorting process may not be entirely effective, and given that there is a much simpler alternative – namely, providing a single-tier sex offender information access system that contains truthful information about offenders and expressly states that no tiering based on likelihood of reoffending has been attempted.

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[7] Studies demonstrate that sex recidivists sometimes commit reoffenses many years and even decades after their initial offense. *See, e.g, Poritz*, 662 A.2d 367, 374 n.1 (N.J. 1995); Prentsky, 21 Law & Hum. Behav. at 652; *see also id.* at 645-53.

II. THE SECOND CIRCUIT ERRED IN CONCLUDING THAT CONNECTICUT'S SINGLE-TIER REGIME IS UNCONSTITUTIONAL

The lower courts' decisions finding the Connecticut SORS unconstitutional fundamentally rest on the premise that "the undifferentiated nature of the [Connecticut] registry" creates an "implied allegation" that falsely stigmatizes convicted sex offenders like Respondents who claim that they are not "dangerous sex offender[s]." *Doe*, 132 F. Supp. 2d at 62; *accord Doe*, 271 F.3d at 49. The Second Circuit further stated that this "implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offences, and information as to their current whereabouts." *Id.*

A. The Lower Courts' "Implied Allegation" Analysis Is Incorrect

The lower courts' "implied allegation" and false stigma analysis is fatally flawed. The Supreme Court's jurisprudence does not support a conclusion that a constitutionally objectionable defamation can be produced by the publication of *indisputably accurate* information such as that conveyed on the Connecticut SORS. There is no dispute in this case that the information actually published about the Respondents is accurate. *See Doe*, 132 F. Supp. 2d at 62-63. There is also no dispute that the Connecticut SORS contained an express disclaimer stating that the State had not made any "'determination that any individual included in the registry is currently dangerous.'" *Doe*, 271 F.3d at 44 (quoting DPS website). There is also no dispute that the website expressly advised that the State had "'not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry,'" and further clarified, lest there be any doubt, that "'[i]ndividuals included within the registry are included solely by virtue of their conviction record and state law.'" *Id.* (quoting disclaimer on DPS website).

Under such circumstances, it is not possible to conjure any false message about Respondents. The lower courts' attempt to do so is fundamentally inconsistent with the website's disclaimer, and nothing in this Court's precedents supports such a result. To the extent that the lower courts tried to find support in *Paul v. Davis*, 424 U.S. 693 (1976), they turned the case on its head. *Paul* rejected the claim that a plaintiff had a right to a due process hearing to vindicate an asserted liberty interest. *Id.* at 694. In *Paul*, the plaintiff asserted that this liberty interest was implicated by his inclusion on a list of "Active Shoplifters" publicly distributed by police, notwithstanding that he merely had been arrested and the charge against him thereafter was "filed away with leave (to reinstate), a disposition which left the charge outstanding" and unresolved. *Id.* at 696 (quotations omitted).

In the course of rejecting the various constitutional claims, *Paul* dismissed the proposition that "the State may not publicize a record of an official act such as an arrest." *Id.* at 713. This statement echoed a similar one made by the *Paul* Court in rejecting the plaintiff's Fourteenth Amendment challenge, in which the Court stated that if the plaintiff's view were to prevail, "a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime . . . presumably obtains a claim against such officers under [Section] 1983." *Id.* at 698. The Court's rejection of this due process proposition fatally undermines Respondents' allegation of a liberty interest in the context of this case, where the Respondents already have been *convicted* of sex offenses and the State has merely published information relating to those convictions (as well as an express disclaimer of any assessment of individual dangerousness).

Given the disclaimer on the Connecticut website, there is no way to find any implied false message about the Respondents. To the extent any specific message is conveyed about Respondents at all, it is that they are members of a group (*i.e.*, convicted sex offenders) that presents a risk of inflicting

serious harm on future victims. If such a message is conveyed – notwithstanding the SORS's statement that "'the main purpose of providing this data on the Internet is to make the information more easily available and accessible,'" *Doe*, 71 F.3d at 44 (quoting website) – that message is unquestionably *true*. Nothing false is either expressly or impliedly at play. As a result, there is no need to have any individualized hearing to determine the truth of the matters on the DPS website. *See Codd v. Velger*, 429 U.S. 624, 627 (1977) (holding that plaintiff has no due process right to any individualized hearing where he did not allege that information was "substantially false," notwithstanding plaintiff's stigma allegation).[8]

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[8] In addition, a subsidiary part of the Second Circuit's reasoning was its notion that the false "implication" purportedly created by the Connecticut SORS "*necessarily*" flowed "*from the State's choice of these particular individuals about whom to disseminate information*, a record as to the their sex offences, and information as to their current whereabouts." *Doe*, 271 F.3d at 49 (emphases added). This notion of improperly choosing "these particular individuals" (*i.e.*, only sex offenders) is more fairly likened to an equal protection analysis than a due process one, and it is fundamentally flawed. This Court has squarely held that legislative classifications based on the nature of criminal offenses are subject only to rational basis review. *See Chapman v. United States*, 500 U.S. 453, 465 (1991). And under rational basis review, it is well settled that a legislature may proceed incrementally in addressing problems. *See, e.g., Williamson v. Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 488-89 (1955). Given available evidence, a State certainly can rationally conclude that the danger posed by sex offender recidivism warrants certain measures that are not needed to address recidivism from those who commit other offenses such as property crimes. *Accord Artway v. Attorney Gen'l of N.J.*, 81 F.3d 1235, 1267 (3d Cir. 1996) (holding that sex offenders are not a suspect class under Fourteenth Amendment analysis). Moreover, a legislature may adopt a conclusive presumption that each member of the group of convicted sex offenders presents a sufficient risk of recidivating to justify community access to sex offender information, without affording an individualized hearing concerning dangerousness, and not run afoul of any "substantive" due process prohibition. *See Michael H. v. Gerald D.*, 491 U.S. 110, 120-21 (1989) (plurality opinion). A legislative decision to enact such a conclusive presumption is subject only to rational basis review, which is satisfied given the danger of sex offender recidivism

(continued...)

B. The Information Provided By Connecticut's Single-Tier Information Access System Is Almost Entirely Public Information Anyway

The fallacy of the "implied stigma" argument is made even clearer by the fact that virtually all of the information available in a single-tier system concerning sex offenders is undeniably public information. In fact, information about the arrest and conviction of sex offenders, like information about most criminal proceedings, *must* be public and *cannot* be taken from the public domain. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (holding that the First Amendment prohibits States from imposing sanctions on the press publishing truthful information contained in court records). Information about "the commission of crime" and the results of "prosecutions resulting from it" are "without question events of legitimate concern to the public." *Id.* at 492.

These issues are of legitimate public concern for many reasons. One is the public's right to know of individuals and businesses that have been convicted of crimes so that citizens can protect themselves – in their business affairs, in their investments, and in their personal interactions with convicts who present the risk of inflicting serious physical and emotional harm should they recidivate. In our Nation, a "trial is a public event," and "[w]hat transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). In this regard, even "the fact of [an] arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting) (citing *Paul v. Davis*, 424 U.S. 693 (1976)); *accord Webster v. Redmond*, 599 F.2d 793, 798 n.6 (7th Cir. 1979) (stating that "publication of an official act such as an arrest does not itself give rise to a meritorious due process claim.") (citing *Paul*, 424 U.S. at 712-13).

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[8] (...continued)
and the fit between community notification and the goals of protecting the public and assisting law enforcement. *See generally id.* at 121.

If the logic of the lower courts' "implied stigma" analysis were correct, then a State would unfairly "stigmatize" some people who had been convicted of crimes simply by making available on the Internet an accessible database of all criminal conviction data. This would be true, notwithstanding that all of the "Criminal Convicts" data would be undeniably public information, and notwithstanding that presentation of such information through the internet simply facilitated access to already-public records.[9] Nothing in this Court's precedents supports such an illogical analysis.

Respondents may contend that the Connecticut SORS is somehow different than the "Criminal Convicts" database hypothesized above because the DPS website states that the information on it "'is made available for the purpose of protecting the public.'" *Doe*, 271 F.3d at 45 (quoting website). This statement, however, cannot be divorced from the specific statement on the website that the DPS "'has not considered or assessed the specific risk of reoffense with regard to any individual . . . and has made no determination that any individual included in the registry is currently dangerous.'" *Id.* at 44 (quoting website). The website's statement that the information was provided to help protect the public – a restatement of one of the purposes of making criminal conviction information publicly accessible in *any* situation – is of no constitutional moment, especially given the express disclaimer on the website that no individualized dangerousness analysis was attempted.[10]

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[9] Of course, the Connecticut SORS also contains information about the sex offenders' current addresses, which can be obtained through the registration regime. However, such registration requirements bear on whether there are "plus factors" at play, not whether there has been inaccurate "stigma" – particularly where, as here, there is no dispute about the accuracy of any information.

[10] CCI does not contend, of course, that States are precluded from adopting multi-tier sex offender notification regimes if they prefer to do so. (continued...)

C. The Lower Court Decisions Do Not Respect People's Ability to Make Sensible Decisions Based on Single-Tier Information Systems

At bottom, the decisions of the lower courts reflect a fundamental distrust in the ability of ordinary Americans to intelligently evaluate information about sex offenders and make rational decisions based on it.[11] Contrary to the tenor of the lower courts' opinions, ordinary Americans are able to sensibly digest the straightforward facts that: (1) a person who lives or works in their neighborhood has previously been convicted of a sex offense of some type; and (2) the State has not attempted to predict whether that person is particularly dangerous at the given time and under the particular circumstances that may confront the community member. The information available through the Connecticut SORS allows a community member to make his or her *own* decision about

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[10] (...continued)
CCI does believe, however, that evidence concerning the difficulty of assessing an individual sex offender's risk of recidivating, and the costs associated with the sorting process, can reasonably lead a State to conclude that a single-tier information access system for all convicted offenders is preferable. To the extent that this Court were to find any impliedly false message conveyed by the Connecticut SORS, CCI respectfully submits that this Court should make clear what sort of disclaimer would be sufficient to dispel such an implied allegation, so that legislatures are not forced to choose between the problems presented by multi-tier systems and the alternative of having no community sex offender notification regime at all.

[11] *See Doe*, 132 F. Supp. 2d at 63 ("Despite the accuracy of the registry data concerning the plaintiff and the statement on the web site that no determination of any individual's dangerousness has been made, the registry suggests that plaintiff is currently dangerous"); *Doe*, 271 F.3d at 42 (stating that the SORS leaves registrants "branded as likely to be currently dangerous offenders irrespective of whether they are"); *see also* Brief of Plaintiffs-Appellees Samuel Poe and John Doe, United States Court of Appeals for the Second Circuit, Docket Nos. 01-7561 (L), 01-7600 (XAP), at 49 (contending that the nature of the Connecticut information access mechanism "preclude[s] it from providing any meaningful information to members of the public about which offenders pose a threat to them").

what preventive steps, if any, are appropriate to protect that person, that person's spouse, or that person's children from the risk that the sex offender may present under a given set of circumstances at a given point in time. *See* 64 Fed. Reg. at 581 (stating that the regulations implementing the Wetterling Act are designed to ensure "that registration programs will include means for members of the public to obtain information concerning registered offenders that is necessary for the protection of themselves or their families").

Given the undisputable fact that "[s]ex offenses are almost always committed in private," *Verniero*, 119 F.3d at 1108, a person informed through the Connecticut SORS may conclude that no material risk is presented to them by a convicted sex offender who works pumping gas at the local filling station, or who is a clerk in the local hardware store. In contrast, a parent informed through the Connecticut SORS quite sensibly may conclude that an unacceptable risk is presented, for example, where the convicted sex offender wants to coach a youth swim team, or volunteer at a local day camp, or be a children's dance instructor.

The basic point is that the information access provisions in the Connecticut SORS give community members information to make these sorts of judgments *for themselves*. The genesis of the original Megan's Law, of course, was the idea that knowledge, rather than ignorance, was appropriate concerning the presence of sex offenders. This knowledge is essential, because sex offenders depend on anonymity and seclusion to commit many of their crimes. There is nothing in law or logic that justifies the conclusion that average Americans should not – indeed, constitutionally *may not* – be given information such as that available through the Connecticut SORS so that they can make reasonable, context-specific risk assessments to protect themselves and their families. That is particularly true where Connecticut has expressly informed citizens that no offender-specific risk assessment has been attempted.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

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